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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 349

MAYFLOWER FARMS, INC.,

Appellant,

vs.

CHARLES H. BALDWIN, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION.

HENRY S. MANLEY,
Counsel for Appellees.

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Appellees.

STATEMENT OPPOSING JURISDICTION.

This appeal is taken from an order of the Supreme Court of the State of New York, in a certiorari proceeding, affirmed by the Court of Appeals of the State. The decisions below are reported, *Matter of Mayflower Farms, Inc.* v. *Baldwin*, 242 App. Div. 881-882 mem., affirmed 267 N. Y. 9.

It is respectfully suggested that no constitutional question is necessarily involved in this case, because the feature of the statute by which the appellant is aggrieved, even if it is unconstitutional, is not separable from other parts of the statute so that the plaintiff will obtain any relief by an adjudication of unconstitutionality.

The statutory provision, so far as now relevant, is a single sentence of the Milk Control Law (Ch. 126 of N. Y. Laws of 1934, Section 258-q) as follows:

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Appellant has not been engaged continuously in business since April 10, 1933; it was not incorporated until May, 1933. It insists, nevertheless, that it is entitled to sell at the lower price. There is no provision authorizing such a price for any dealer except the statutory language quoted above. Obviously it is inapplicable to the appellant, unless by a very peculiar operation of judicial surgery.

The majority opinion of the Court of Appeals passed over that question, addressed itself to the constitutional question, and upon that question decided against the appellant. That was sufficient ground to decide against the appellant, but the dissenting opinion of Judge Finch found it necessary, as will any opinion that is written for the relief of the appellant, to decide the question of separability. That question is essential to the appellant's case, and unless it can be decided in the appellant's favor no constitutional question is presented.

The dissenting opinion dealt with the question of separability as follows:

> "Although the time limitation clause is unconstitutional as denying to the appellant the equal protection of the laws, this does not require that the entire provision be declared a nullity. The section contained a separability clause and it is only necessary to delete the offending clause, viz: 'since April 10, 1933.' With the arbitrary time limitation excised from the unadvertised differential provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded."

It is respectfully submitted that the dissenting opinion erred upon the question of separability, and that "judicial surgery" should not be exercised for the purpose of extending to the appellant and other new dealers the benefit of a somewhat remarkable statutory provision, not extended to them by the Legislature.

The Legislature was moved by the anticipated hardship of an even price, upon dealers whose existing businesses depended upon continuing sales at a lower price, to make them a concession which this Court has said is "novel, if not unique." (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194.) The Legislature made the concession only to the extent that it was needed. It intended merely to save *existing* business done on the lower price level; it had no intention of encouraging new dealers to come in on that

basis. There is no reason to suppose that the Legislature would have made the privilege to sell at the lower price apply alike to new and old dealers in unadvertised milk if it had been told that it could not limit the privilege to old dealers.

The appellant can be saved only by judicial extension of a statutory provision not favored by this Court, along lines which the Legislature did not intend and probably would not have approved, and of such nature as to aggravate the charges being made against the statutory provision as a whole in the *Borden* suit. The constitutional argument of the appellant is not within the jurisdiction of the court because even a favorable answer would be no defense to the appellant.

However, it is understood that the *Borden* suit will be before the Court again at the present term, and the labors of the Court probably will not be greatly increased by hearing the present appeal with it, at which time the relation between the two questions involved in the present appeal (separability and constitutionality) can be more fully considered.

It is respectfully submitted that in the present appeal the question of jurisdiction be deferred until oral argument.

HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets and Attorney for the Appellees.

Dated, Albany, July 26, 1935.